FILE COPY

Office - Supreme Court, U. S.
FILED
JUL 17 1945
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 234

MISSISSIPPI PUBLISHING CORPORATION,
Petitioner,

vs.

DENNIS MURPHREE

PETITION FOR WRIT OF CERTIORARI, WITH BRIEF THEREUPON, TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

E. C. Brewer,
Clarksdale, Mississippi;
William H. Watkins,
P. H. Eager, Jr.,
Mrs. Elizabeth Hulen,
Jackson, Mississippi,
Counsel for Petitioner.

Watkins & Eager,
Watkins & Avery,
Of Counsel for Petitioner.

INDEX

Subject Index

Table of Cases Cited

Page

Page

STATUTES CITED

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 234

MISSISSIPPI PUBLISHING CORPORATION,
Petitioner,

vs.

DENNIS MURPHREE

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Jurisdictional Statement

The jurisdiction of this Honorable Court is invoked under Section 240(a) and subsection 8(a) of the Judicial Code, as amended, 28 U. S. C. A., Sections 347 and 350, and Supreme Court Rule 38, 5(b).

Summary Statement of Matters Involved

Petitioner, Mississippi Publishing Corporation (hereinafter called petitioner), by its counsel, prays that a writ of certiorari issue to review the decision (R. 52) of the United States Circuit Court of Appeals for the Fifth Circuit,

rendered May 7, 1945, in an action entitled: "Dennis Murphree, Appellant, versus Mississippi Publishing Corporation, Appellee," docket number 11,254, reversing an order (R. 43) of the District Court of the United States for the Northern District of Mississippi in favor of petitioner, which dismissed without prejudice the complaint of plaintiff, Dennis Murphree (hereinafter referred to as respondent), on motion of petitioner, on the ground that there was not proper territorial jurisdiction in the District Court of the Northern District of Mississippi.

The respondent, Dennis Murphree, on the 17th day of August, 1944, filed suit against the petitioner in the District Court of the United States for the Western Division of the Northern District of Mississippi, alleging that he was an adult resident of such district; that the respondent was a foreign corporation qualified to do business in Mississippi and was conducting business in all of the counties of the state, including the Northern District thereof; that it had appointed an agent for service of process residing in Jackson, in the Southern District of Mississippi. Respondent's complaint alleged that petitioner published certain newspapers in Jackson, Mississippi, in the Southern District thereof, having a wide circulation in the State of Mississippi, and upon the 25th day of July, 1944, published in the columns of such paper defamatory matter concerning him for which judgment was asked. The petitioner filed a motion to dismiss the complaint under Rule 12 of Rules of Civil Procedure, assigning as reasons therefor (1) that the Court was without jurisdiction over the subject matter, (2) that the Court was without jurisdiction over the person of petitioner, (3) that the venue in the case was improperly laid, (4) that insufficient and void process was issued, (5) that the attempted service of process was insufficient. From such motion, supported by affidavits, it appeared that petitioner was a foreign corporation existing under the

laws of the State of Delaware; that its principal and only place of business in the State of Mississippi was in Jackson, Hinds County, Mississippi, in the Southern District thereof; that it had never been domesticated under the laws of the State of Mississippi. That it had no office, officer, agent or servant in the Northern District of Mississippi at any time; that if the newspaper complained of published by it circulated in the Northern District of Mississippi, as was admitted, the same was mailed by the petitioner to its regular subscribers therein or sent by public transportation to news dealers in the Northern District of Mississippi who purchased such newspapers and sold the same as independent dealers to their own customers. Such newspapers were composed, published, printed, first circulated and read in the City of Jackson, in the First Judicial District of Hinds County, Mississippi, in the Southern District thereof, wherein respondent's cause of action accrued, if any he had. Process issued from the Office of the Clerk of the United States District Court in the Northern District to the Marshal of the Southern District of Mississippi and was served on petitioner's resident agent in the Southern District of Mississippi.

Upon the hearing of the motion to dismiss for the reasons assigned, it was conceded that the petitioner had not transacted any business in the Northern District of Mississippi; that such action, if any, as the respondent had against the petitioner, accrued in Jackson, in the Southern District of Mississippi and not elsewhere. The District Judge sustained the petitioner's motion to dismiss the action for lack of jurisdiction, holding that the petitioner having transacted no business in the Northern District of Mississippi could be sued in a civil action, not local, only in the Southern District of Mississippi.

Petitioner asserted that respondent was not an inhabitant or resident of the Northern District of Mississippi but that

upon the other hand, with his family, moved to Jackson, in the Southern District of Mississippi in 1924, acquired a home in which he and his family have continuously resided since such time (R. 25, 28, 34). The judgment of the United States Circuit Court of Appeals reversing the judgment of the District Court will be found (R. 56).

Questions Presented

1. Assuming that the respondent was a resident of the Northern District of Mississippi, the District Court of the Northern District of Mississippi had no jurisdiction, territorial or otherwise, over the petitioner and venue was improperly laid, because petitioner was a foreign corporation created under the laws of the State of Delaware and had never entered or transacted any business within the territorial limits of the Northern District of Mississippi, but its only office and place of business in the State of Mississippi was had at Jackson, in the Southern District of Mississippi where the cause of action accrued, if any there was.

2. Under Sections 112 and 113, U. S. C. A., Title 28, 51 and 52 Judicial Code, the United States District Court for the Northern District of Mississippi was without jurisdiction, territorial or otherwise, and the venue was improperly laid, unless the petitioner transacted business and was present within the territorial limits of the Court. Personal jurisdiction of the petitioner could not be obtained under Rule 4(f), Rules of Civil Procedure, for use in the United States District Courts unless the petitioner was present within the territorial jurisdiction of the Northern District.

3. Rule 4(f), Rules of Civil Procedure in Federal District Courts of the United States, did not enlarge or abridge

the jurisdiction or venue in the District Courts of the United States.

4. Rule 4(f), Rules of Civil Procedure for the District Courts of the United States does not authorize the issuance of process to a different district in a civil action, not of a local character, where the defendant is not a resident or inhabitant of the district and not present within the territorial limits of the district when sued alone.

5. The respondent at the time of filing the suit was a resident and inhabitant of the Southern District of Mississippi by reason whereof the District Court for the Northern District of Mississippi was without jurisdiction, territorial or otherwise, over the petitioner and the venue was improperly laid.

Reasons Relied on for the Allowance of the Writ

Reason I: The Circuit Court of Appeals has decided federal questions in conflict with applicable decisions of this Court.

(a) Before territorial jurisdiction could be acquired by the District Court of the United States for the Northern District of Mississippi over petitioner when sued alone in an action not local, over its objection, petitioner must have been doing business within the territorial limits of the Northern District of Mississippi. *Stonite Products Co.* v. *Melvin Lloyd Co.*, 315 U. S. 561, 567, 86 L. Ed. 1027; *Oklahoma Packing Co.* v. *Oklahoma Gas and Electric* Co., 309 U. S. 4, 84 L. Ed. 537; *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 365, 84 L. Ed. 167; *Employers Reinsurance Corp.* v. *Bryant*, 299 U. S. 374, 81 L. Ed. 289; *Robertson* v. *Railroad Labor Board*, 268 U. S. 619, 69 L. Ed. 1119; *Bank of America* v. *Whitney Central National Bank*, 261 U. S. 171, 67 L. Ed. 594; *Peoples Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79, 62 L. Ed. 587; *St. L. & S. W. Ry. Co.* v. *Alex-*

ander, 227 U. S. 218, 51 L. Ed. 486; *Green* v. *Chicago, Burlington & Quincy Ry. Co.*, 205 U. S. 530, 51 L. Ed. 916; *Ex Parte Wisner*, 203 U. S. 449, 459, 51 L. Ed. 264, 267; *Harkness* v. *Hyde*, 98 U. S. 476, 25 L. Ed. 237; *Toland* v. *Spray*, 12 Pet. 300, 9 L. Ed. 1093.

(b) The Circuit Court of Appeals has rendered a decision upon the question stated in the preceding paragraph in conflict with the decisions of other Circuit Courts of Appeal on the same matter. *Sperry Products, Inc.* v. *Association of American Railroads*, C. C. A. 2, 132 F. (2d) 408; *Contracting Division A. C. Horn Corp.* v. *New York Life Insurance Co.*, C. C. A. 2, 113 F. (2d) 864; *London* v. *N. & W. Ry. Co.*; 4 Cir. 111 F. (2d) 127, see cases cited therein; *Oklahoma Packing Co.* v. *Oklahoma Gas and Electric Co.*, C. C. A. 10, 100 Fed. (2d) 770; *McCall Co.* v. *Bladsworth*, 290 Fed. 365; *Sewchulis* v. *Lehigh Valley Coal Co.*, C. C. A. 4, 233 Fed. 422.

Reason II: The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

(a) The Circuit Court of Appeals has decided that under Rule 4(f) of the Rules of Civil Procedure for the District Courts of the United States the District Court of the Northern District of Mississippi could acquire personal jurisdiction over petitioner in an action not local when sued alone, although it was not present within the territorial jurisdiction of the Northern District of Mississippi, had never transacted business therein, but on the other hand was transacting business in the Southern District of Mississippi where the cause of action, if any, accrued, and where its agent for service of process resided.

(b) The decision of the Circuit Court of Appeals for the Fifth Circuit in holding that Rule 4(f), Rules of Civil Procedure for the District Courts of the United States

could be used to acquire personal jurisdiction over the petitioner by the United States District Court for the Northern District of Mississippi in an action not local, though the petitioner was sued alone, was not present within the territorial jurisdiction of the district, had never transacted business therein, but had its principal and only office in the State of Mississippi in the Southern District of Mississippi where the cause of action arose, if any there was, and where its agent for service of process resided, is in conflict with the decisions of other Circuit Courts of Appeal on the same matter. *Sturgeon* v. *Great Lakes Steel Corp.*, C. C. A., 143 F. (2d) 819; *Davis* v. *Ensign Bickford Co.*, 139 F. (2d) 624; *Dan Cohen Realty Co.* v. *National Saving & Trust Co.*, C. C. A., 125 F. (2d) 288; *Contracting Division A. C. Horn Corp.* v. *New York Life Insurance Co.*, C. C. A. 2, 113 F. (2d) 864; *Doyle* v. *Loring*, C. C. A. 6, 107 F. (2d) 337; *Sewchulis* v. *Lehigh Valley Coal Co.*, C. C. A. 4, 233 Fed. 422.

Reason III: Questions of jurisdiction and venue are substantial. *Harrison* v. *Schaffer*, 312 U. S. 579, 85 L. Ed. 1055; *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 85 L. Ed. 479; *Employer's Reinsurance Corp.* v. *Bryant*, 299 U. S. 374, 81 L. Ed. 289.

Reason IV: This Court has decided a federal question in the way probably in conflict with applicable decisions of this court in that it has held under the facts in this case that respondent was an inhabitant and resident of the Northern District of Mississippi. *District of Columbia* v. *Henry C. Murphy*, 314 U. S. 441, 86 L. Ed. 329; *Philadelphia Railroad Co.* v. *McKibben*, 243 U. S. 284, 61 L. Ed. 710; *Gilbert* v. *David*, 235 U. S. 561, 59 L. Ed. 360.

Reason V: The Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions, in that it has decided that the evidence in the case justified the conclusion that

respondent was a resident and citizen of the Northern District of Mississippi. *Bank of Cruger* v. *Hodge*, 189 Miss. 356, 198 So. 26; *Ritter* v. *Whitesides*, 179 Miss. 706, 176 So. 728; *McHenry* v. *State*, 119 Miss. 289, 80 So. 763; *Hattiesburg* v. *Mollere*, 118 Miss. 154, 79 So. 87; *Hairston* v. *Hairston*, 27 Miss. 704.

Reason VI: The Circuit Court of Appeals has decided an important question of local law probably in conflict with local decisions in that the court holds that the appointment of an agent for service of process by a foreign corporation, though transacting business in but one district in the state, renders it subject to suit in any Court, State or Federal, in the state. *Forman* v. *Mississippi Publishers Corporation*, 195 Miss. 90, 14 So. (2d) 344; *Sanford* v. *Dixie Construction Co.*, 157 Miss. 627, 128 So. 887.

Reason VII: The case involves an important question of federal law never before decided by this Court as to whether or not under Rule 4(f), Rules of Civil Procedure for the District Courts of the United States, personal jurisdiction may be obtained over a defendant and inhabitant of another district, when sued alone, in an action not local. The decision of the Circuit Court of Appeals in this case is contrary to applicable decisions of this Court and in conflict with the decisions of other Circuit Courts of Appeal on similar questions. It is in the public interest that the writ of certiorari in this case prayed for be granted and that this Court determine the questions presented. The decision is revolutionary in character, is supported by no other authoritative decision, will result in the deprivation of substantial rights of defendants, corporate as well as individual.

Under the decision of the Circuit Court of Appeals in this case the petitioner, although an inhabitant of the Southern District of Mississippi, and has never transacted

business of any character in the Northern District, is required to go to the inconvenience and expense of defending itself in the United States District Court some 200 miles from the location of its principal and only office in the State of Mississippi where, under the Mississippi Law, the cause of action, if any, accrued and the suit would have to be filed.

If the Rule announced for the Circuit Court of Appeals in this case is to prevail, a foreign corporation having its principal and only office in the State of Texas, in Brownsville, in the Southern District, could be required at the suit of an alleged resident of Texas, residing in the Northern District thereof, to defend a suit not of a local nature arising in the Southern District of Texas at Amarillo, Texas, approximately 900 miles distant, or a resident of the Southern District having a cause of action might move to the extreme Northern District, acquire a residence and require the defendant to appear and defend the suit in the Northern District. A corporate defendant residing at El Paso, Texas, could be required to defend a suit, not of a local nature, arising in El Paso in the Western District of Texas in Beaumont, in the Eastern District of the State of Texas, some 800 miles distant. In California a corporate defendant residing in the Southern District of the state, upon the same ground, could be required to go a thousand or 1200 miles to make its defense in an action, not of a local nature, arising in the Southern District. Other instances of inconvenience and deprivation of substantial rights might be stated. A mere statement demonstrates the necessity that this Court grant and take jurisdiction of the case.

The petitioner files herewith ten printed copies of the record as printed below together with the proceedings and opinion in the United States Circuit Court of Appeals.

Reason VIII. The decision of the United States Circuit Court of Appeals is probably directly in conflict with the

holding in the case of *Stonite Products Co.* v. *Melvin Lloyd Co.*, 315 U. S. 561, 86 L. Ed. 1027, wherein this Court has held that Section 113, being Section 52 of the Judicial Code, is an exception to Section 112. Section 113, Title 28, U. S. C. A., contains the following language:

> "113. (Judicial Code, Section 52.) SUITS IN STATES CONTAINING MORE THAN ONE DISTRICT. When a State contains more than one district, every suit not of a local nature, in the district court thereof, against a single defendant, inhabitant of such State, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the State, it may be brought in either district, and a duplicate writ may be issued against the defendant, directed to the marshal of any other district in which any defendant resides."

Reason IX: And for other reasons appearing to be assigned at the hearing.

WHEREFORE, petitioner prays for a writ of certiorari from this Honorable Court directed to the United States Circuit Court of Appeals, for the Fifth Circuit, commanding that Court to certify and send to this Court, for its review and determination, on a day therein named, a full and complete transcript of the record and all proceedings in the case of *Dennis Murphree* v. *Mississippi Publishing Corporation*, No. 11,254 on the docket of the Court, and that said judgment of said Court may be reversed and petitioner afforded appropriate relief.

E. C. BREWER,
Clarksdale, Mississippi;
WILLIAM H. WATKINS,
P. H. EAGER, JR.,
MRS. ELIZABETH HULEN,
Jackson, Mississippi;
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 234

MISSISSIPPI PUBLISHING CORPORATION,
Petitioner,

vs.

DENNIS MURPHREE

BRIEF FOR PETITIONER

Opinions Below

The opinion of the District Judge is not officially reported but is printed in the record on Page 43, a copy thereof being made *Appendix "A"* to this brief. The opinion of the United States Circuit Court of Appeals filed May 7, 1945, is reported "Dennis Murphree vs. Mississippi Publishing Corporation, 149 Fed. (2d) 138, is printed in the record at page 52 and is made *Appendix "B"* to this brief.

Basis for Jurisdiction

The statement showing the grounds upon which jurisdiction of this Court is invoked is set forth at Page 1 of the foregoing petition and is, by reference, adopted as a part of this brief.

Statutes Involved

(A) This case involves a construction of Paragraph (a), Section 112, U. S. C. A., Title 28 (Judicial Code, Section 51, Amended), containing the following language:

> "Except as provided in sections 113 to 117 of this title, no person shall be arrested in one district for trial in another in any civil action before a district court; and, except as provided in sections 113 to 118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

As well as Section 113, U. S. C. A., Title 28, containing the following language:

> "113. (Judicial Code, Section 52). SUITS IN STATES CONTAINING MORE THAN ONE DISTRICT. When a State contains more than one district, every suit not of a local nature, in the district court thereof, against a single defendant, inhabitant of such State, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the State, it may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides."

(B) Rule 4(f), Rules of Civil Procedure, for the District Courts of the United States, contains the following language:

> "*Territorial Limits of Effective Service.* All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States

so provides, beyond the territorial limits of that state. A subpoena may be served within the territorial limits provided in Rule 45."

(C) Rule 82, Rules of Civil Procedure, for the District Courts of the United States, is in the following language:

"*Jurisdiction and Venue Unaffected.* These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein."

(D) Section 5319, Mississippi 1942 Code, which is made *Appendix "C."* to this brief.

Statement

The material facts have been set forth in the Summary Statement at pages 1, et seq., of the preceding petition, and such statement is, by reference, adopted as part of this brief.

ARGUMENT

Point I

The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

A. The Circuit Court of Appeals, in this case, has decided that a foreign corporation with its principal and only office situated in the Southern District of Mississippi, having appointed an agent for service of process under the statutes of the State of Mississippi, may be sued in an action, not local, in the United States District Court for the Northern District of Mississippi, by a citizen and resident of such district, and that under Rule 4(f), Rules of Civil Procedure for the District Courts of the United States, process may issue to the Southern District of Mississippi,

be served upon the agent for service of process there, and personal jurisdiction of the defendant thereby obtained. This Court not only has never decided the precise question, but the decision violates all regularly established conceptions of jurisdiction and venue in the District Courts of the United States.

The Court has decided that where a foreign corporation has entered a state and appointed an agent for service of process, it may be sued in any Federal Court, regardless of whether the foreign corporation is transacting business within the district or not, when sued by a citizen and that the jurisdiction may be supplemented and acquired by Rule 4(f).

The decision of the Court grows out of a misunderstanding of the case of *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 356, 84 L. Ed. 167, 128 A. L. R. 1847, and the decision of *Oklahoma Packing Co.* v. *Oklahoma Gas and Electric Co.*; 309 U. S. 4, 84 L. Ed. 537. In the *Neirbo* case a resident of New Jersey brought suit in the United States District Court for the Southern District of New York against several corporate defendants; one of them, the Bethlehem, a Delaware corporation, which maintained its principal office and was engaged in business in the Southern District of New York. No question of venue was raised by either of the other defendants. The Bethlehem, however, relying upon former decisions of this Court, objected to the venue. This Court held that by the appointment of an agent for the service of process the defendant had consented to be sued in the Federal Courts of New York in the district where it was engaged in business and maintained its principal office and place of business. It must be borne in mind that the question involved in that case was as to whether or not a foreign corporation, though maintaining its principal place of business in the Southern District of

New York, could be sued therein by a non-resident of the state. The Court held that the Bethlehem, having appointed an agent for the service of process under state laws had waived the objection which it might otherwise assert against being sued in a Federal Court by a non-resident of New York, other than at its place of domicile and had consented to be sued in the Federal Court of the State of New York in a district where it maintained its principal place of business. The Court held that for practical purposes of venue the Bethlehem was a resident and inhabitant of the Southern District of New York. The opinion of the *Neirbo* case was bottomed upon the case of *Ex Parte Schollenberger,* 96 U. S. 369, 24 L. Ed. 853, where it was held that a foreign insurance company, as a condition precedent to doing business in the State of Pennsylvania, appointed an agent for service of process and consented to be sued in the state, might be sued in the Federal Court of the district in which said company transacted business by a citizen of the State of Pennsylvania. The Court held that such insurance company for purposes of venue became an inhabitant of the district in which it carried on business.

It is significant that the *Schollenberger* case, *supra,* refers to the case of *The Baltimore and Ohio Railroad Co.* v. *Harris,* 12 Wall. 65, 20 L. Ed. 354, where a foreign railroad corporation was transacting business and consented to be sued in the District of Columbia. Suit was bought against the foreign corporation in the District and this Court held that such foreign corporation was an inhabitant of the particular district in which it was engaged in business. There is nothing in either the *Neirbo* case or the *Oklahoma Packing Company* case, a case which is identical in principle, to justify the conclusion that by reason of Rule 4(f), Rules of Civil Procedure for the District Courts of the United States, a corporation may be sued alone in a transitory action in a district other than that in which it is engaged in business,

merely because it has appointed an agent for service of process.

The petitioner, under Section 5319, Mississippi 1942 Code, had appointed an agent for service of process. The effect given by the State Court to the statute is binding on the Federal Court. The following authorities are directly in point: *Massachusetts Bonding and Insurance Company* v. *Concrete Steel Bridge Co.*, 37 Fed. (2d) 695 (C. C. A. 4); *Pennsylvania Fire Insurance Co.* v. *Gold Issue Co.*, 243 U. S. 93, 37 S. Ct. 344, 61 L. Ed. 610; *Louisville Railway Co.* v. *Chatters*, 279 U. S. 320, 49 S. Ct. 329, 73 L. Ed. 711; *Maichok* v. *Bertha-Consumers Co.* (C. C. A. 6), 25 Fed. (2d) 257; *Smolik* v. *Philadelphia Iron Co.* (D. C.), 222 Fed. 148; *Mooney* v. *Buford Co.* (C. C. A. 7), 72 Fed. 32.

In the case of *Forman* v. *Mississippi Publishers Corporation*, 195 Miss. 90, 14 So. (2d) 344, the Supreme Court of Mississippi construed Section 5319, Mississippi 1942 Code, and held that it did not modify either venue or jurisdiction; that a cause of action for the publishing of a libelous publication accrued where the papers were published and first read; that suit could only be filed where the cause of action accrued, or where, as to a domestic corporation, it was domiciled, or, as to a foreign corporation, where it had its principal place of business. (See Section 1433, Mississippi 1942 Code, which is made *Appendix "D"* to this brief.)

B. The Circuit Court of Appeals has so construed Rule 4 (f), Rules of Civil Procedure, as to enlarge the jurisdiction of the District Court of the Northern District of Mississippi so as to enable it to entertain a suit against the petitioner, a foreign corporation, not present within the territorial jurisdiction of the Northern District of Mississippi, over a cause of action which arose in the Southern District.

The decision of the Circuit Court of Appeals is in direct conflict with the case of *Contracting Division A. C. Horn Corp. v. New York Life Insurance Company* (C. C. A. 2), 113 Fed. (2d) 864. In that case the appellant filed suit against the New York Life Insurance Company for the infringement of a patent. The suit was filed in the Southern District of New York. The appellant found that it would be necessary to join as party defendant the holder of the patent, and move the Court under Federal Rules of Civil Procedure for the District Courts of the United States to do so. It appeared, however, that the party did not reside in the Southern District of New York, but resided in the Eastern District of the State of New York. The Court held that personal jurisdiction of the cross-defendant could not be obtained since the Federal Rules did not enlarge or abridge the jurisdiction and venue in Federal Courts. The Court used the following language:

> "Recognizing the necessity of having the patent owner in court, the appellant moved to join Research and A. C. Horn Company as parties plaintiff, and now attacks denial of that motion as error. It relies upon Rules 13(h), 19 (a), and 21 of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c; but it fails to take note of Rule 82, which states that the rules shall not be construed to extend the jurisdiction of district courts or the venue of actions therein. Neither Research nor A. C. Horn Company is a resident of the southern district of New York, nor has either a regular and established place of business in this district. They are residents of the Eastern district of New York, and have their place of business there. This presents an insuperable obstacle to forcing them against their will into a suit in the southern district, if they be viewed as corporate entities separate and distinct from the plaintiff. Gibbs v. Emerson Electric Mfg. Co., D. C. W. D. Mo., 29 F. Supp. 810; Melekov v. Collins, D. C. S. D. Cal., 30 F. Supp. 159."

It is very true that the foregoing case is not dealing with Rule 4(f), but the questions presented are identical since the Circuit Court of Appeals for the Second Circuit does hold that personal jurisdiction may not be obtained over a defendant not an inhabitant of the district. The court cites in support of its conclusion two opinions of District Judges dealing with Rule 4(f). In the following cases from other Circuit Courts of Appeal it is held that the Federal Rules of Civil Procedure in no manner enlarge or abridge jurisdiction or venue: *Sturgeon* v. *Great Lakes Steel Corp.*, C. C. A., 143 F.(2d) 819; *Davis* v. *Ensign Bickford Co.*, 139 F.(2d) 624; *Dan Cohen Realty Co.* v. *National Savings & Trust Co.*, C. C. A., 125 F.(2d) 288; *Doyle* v. *Loring*, C. C. A., 107 F.(2d) 337; *Sewchulis* v. *Lehigh Valley Coal Co.*, C. C. A. 4, 233 Fed. 422.

The following decisions of District Courts are contrary to the Rule announced in the Circuit Court of Appeals in this case:

United States v. *Skilken*, 53 Fed. Supp. 14; *Herrington* v. *Jones*, 2 F. R. D. 108; *Brown Paper Mill Co.* v. *Agar Mfg. Corp.*, 1 F. R. D. 579; *Diepen* v. *Fernow*, D. C. Mich., 1 F. R. D. 378; *Adolph Salvatori* v. *Miller Music, Inc.*, 35 F. Supp. 845; *Red Top Trucking Corp.* v. *Seaboard Freight Lines, Inc.*, 35 F. Supp. 740; *U. S. F. & G. Co.* v. *John R. Alley & Co.*, 34 Fed. Supp. 604; *Cashmere Valley Bank* v. *Pacific Fruit & Produce Co.*, 33 Fed. Supp. 946; *Barnsdall Refining Corp.* v. *Birnamwood Oil Co.*, 32 Fed. Supp. 314; *Gibbs* v. *Emerson Electric Manufacturing Co.*, 31 Fed. Supp. 983; *Carby* v. *Greco*, 31 Fed. Supp. 251; *Kellar* v. *American Sales Book Co.*, 16 Fed. Supp. 189; *Melekov* v. *Collins*, 30 Fed. Supp. 159.

An outstanding District Court opinion is that of Judge Miller, Western District of Kentucky, *Carby* v. *Greco*, 31 Fed. Supp. 251. There suit was filed by residents of the

Western District of Kentucky against non-residents of the state for injury occurring in an automobile collision. The non-residents had appointed the Secretary of State under the laws of Kentucky, as agent for service of process but the defendants were not present and could not be found in the Western District. The Court held that jurisdiction over the person of the defendants was essential. The Court used the following language:

> "The rule was stated in Employers' Reinsurance Corp. v. Bryant, supra, as follows: 'The defendant was not before the court, and therefore it was without jurisdiction to proceed with the suit. Counsel for the petitioner assume that the presence of the defendant was not an element of the court's jurisdiction as a federal court; but the assumption is a mistaken one. By repeated decisions in this Court it has been adjudged that the presence of the defendant in a suit in personam, such as the one now under discussion, is an essential element of the jurisdiction, of a district (formerly circuit) court as a federal court, and that in the absence of this element the court is powerless to proceed to an adjudication.' "

Addressing itself to the question presented in this case, the Court used the following language:

> "Congress, of course, has the power to enlarge the jurisdiction of the District Court by statute, and make such service valid in a case of this kind. But it has not done so. The statute authorizing the adoption of the New Rules specifically refrains from doing so. Title 28 U. S. C. A. 723B. Rule 82 itself embodies this statutory restriction. In construing the rules it must be kept in mind that the method of serving a summons is procedural; the effect of such service when made is jurisdictional. Sewchulis v. Lehigh Valley Coal Co., 2 Cir., 239 F. 422; Keller v. American Sales Book Co., D. C., 16 F. Supp. 189. In the present case the effect of holding the service valid under Rule 4(f) is to obtain

jurisdiction over the defendant, where jurisdiction did not exist except for the rule. Such a construction is unauthorized under Rule 82.

"Defendant's motions are sustained."

C. Personal jurisdiction over the petitioner was a matter of substance and not mere procedure.

The Act of Congress dated June 19, 1934, providing for Rules of Civil Procedure for the District Courts of the United States had reference only to matters of practice and procedure, and not matters of substance. The Circuit Court of Appeals in this case has failed to distinguish between mere service of process and the effect of such service. Rule 82 expressly provides that neither venue nor jurisdiction shall be enlarged or abridged by the Rules of Civil Procedure. Rule 4(f) is one of practice and procedure and is intended to provide a method for bringing before the Court a defendant within the territorial jurisdiction of the Court unless otherwise provided by Congress, in cases where there is but one defendant. It has been expressly decided by this Court that the Rules of Civil Procedure do not dispense with matters of substance. *Carter H. Harrison* v. *Schaffer*, 312 U. S. 579, 85 L. Ed. 1055; *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 85 L. Ed. 479.

In the case of *Employers Reinsurance Corp.* v. *Bryant*, 299 U. S. 374, 81 L. Ed. 289 supra, it is held that the presence of the defendant within the territorial jurisdiction of the court was an essential element of the court's jurisdiction and a matter of substance, not merely one of practice or procedure. To the same effect see the case of *Robertson* v. *Railroad Labor Board*, 268 U. S. 619, 69 L. Ed. 1119.

The Circuit Court of Appeals placed too much emphasis upon service of process, overlooking the importance of the question of personal jurisdiction over the petitioner which was not a matter of mere precedure but one of substance.

In the case of *Sewchulis v. Lehigh Valley Coal Co.*, 233 Fed. 422 (C. C. A. 2), Judge Huff, speaking for the Court, said:

> "But there is a wide difference between the method of serving a summons and the effect of such service when made. The first relates to the 'form, manner, and order of conducting and carrying on suits.' The effect of the formal act called 'service' is not a question of practice at all, but one of jurisdiction, and jurisdiction in turn must be tested by substantive law."

Note 1 to the opinion will be found in the following language:

> "This is the definition of 'practice' in Bouvier's Law Dictionary, which in Kring v. Missouri, 107 U. S. 231, 2 Sup. Ct. 443, 27 L. Ed. 506, is said to be 'the best work of the kind in this country.'"

See the opinion of District Judge Miller in *Carby* v. *Greco*, supra (D. C., Ky.), 31 Fed. Supp. 251.

The Circuit Court of Appeals in deciding the present case used the following language:

> "More troublesome, perhaps, is the question whether the court of the Northern District could obtain jurisdiction over the person of the defendant by service of process outside the district. This question relates to the power of the Supreme Court to promulgate Rule 4(f) of the Federal Rules of Civil Procedure. While the rule affects neither venue nor jurisdiction over the subject matter, it does permit the court to acquire personal jurisdiction over a defendant in another district within the state in a case like the present—a power that did not exist prior to the adoption of the rules. As was pointed out in Moore's Federal Practice, Vol. 1, page 361, 'Since the Advisory Committee specifically called the attention of the Supreme Court to the question of its power to promulgate this rule, it may be safely assumed that the Supreme Court, by promulgating the rule, has concluded that it has the power.'"

We submit to the Court that the mere fact that the Rules were approved with the expression of doubt by the Committee, that under Rule 4(f) process could not validly be issued to another district where one defendant was sued alone, does not justify the conclusion adopted by the court in this case. In the case of *Carby* v. *Greco*, supra, the District Judge used the following relevant language:

> "It is well settled that, except where specifically authorized by a federal statute, the civil process of a federal District Court does not run outside the district, and that service outside of the district is void. Toland v. Sprague, 12 Pet. 300, 9 L. Ed. 1093; Munter v. Weil Corset Co., 261 U. S. 276, 43 S. Ct. 347, 67 L. Ed. 652; Robertson v. Railroad Labor Board, 268 U. S. 619, 45 S. Ct. 621, 69 L. Ed. 1119; Employers Reinsurance Corp. v. Bryant, 299 U. S. 374, 57 S. Ct. 273, 277, 81 L. Ed. 289."

The members of the Committee were confronted with that rule, and, therefore, entertained doubt as to whether or not if a defendant was present within the district process could be sent for service upon a resident agent in another district, unless specially authorized by Act of Congress. The necessity that process issue to some other district would only be authorized where the Court had jurisdiction and the venue was properly laid. Suppose that the petitioner had its principal office and place of business in the Northern District of Mississippi, but its agent for service of process was in the Southern District of the state. Rule 4(f) would be applicable and process might be issued and be served in the Southern District. Again, suppose that a domestic corporation, domiciled in the Northern District of Mississippi, has its agent for service of process in the Southern District, Rule 4(f) would be applicable.

Again, Congress might fix venue and jurisdiction in one district for suit, and it might be necessary to send process

to some other district for service upon the resident agent. We are attaching as *Appendix "E"* a statement contained in Harvard Law Review, Volume 53, Page 660, dealing with the subject matter, which is interesting.

It is a matter of substance that a defendant be sued in the district in which it is an inhabitant or resident, when sued alone. It is not a matter of substance but a matter of procedure as to where the process might be served. It is this essential distinction which the Court of Appeals has overlooked in the decision of the present case.

Point II

The decision of the United States Circuit Court of Appeals in this case is contrary to applicable decisions of this Court construing Sections 112 and 113, U. S. C. A., Title 28.

The jurisdiction and venue of suits in District Courts of the United States is expressly provided by the Acts of Congress. Sections 112 and 113, Title 28, U. S. C. A., provide the district in which civil suits shall be brought. Paragraph (a) thereof contains the following provision:

> "(a) Except as provided in sections 113 to 117 of this title, no person shall be arrested in one district for trial in another in any civil action before a district court; and, except as provided in sections 113 to 118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant;"

The foregoing is the basic general provision as to where civil suits shall be filed in the District Courts of the United States. The requirement is that the suit shall be brought in the district whereof the defendant is an inhabitant. The right to be immuned from suit except as provided in the fore-

going provision is a substantial right of the defendant. The paragraph, however, contains the following provision:

> "* * * but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

This provision does not enlarge the place where suit may be filed, but restricts the same.

The State of Mississippi has two districts, the Northern and the Southern, and this case comes under Section 113, U. S. C. A., Title 28, 52 Judicial Code, where the following language is used:

> "113. (JUDICIAL CODE, SECTION 52.) SUITS IN STATES CONTAINING MORE THAN ONE DISTRICT. When a State contains more than one district, every suit not of a local nature, in the district court thereof, against a single defendant, inhabitant of such State, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the State, it may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides."

The authorities are unanimous that the words "inhabitant" and "resident", as used in statutes fixing Federal jurisdiction and venue, are synonymous. *In re Keasbey & Mattison Co.*, 160 U. S. 221, 16 S. Ct. 273, 40 L. Ed. 402; *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768; *Bogue* v. *Chicago*, 193 Fed. 728, 733; *Stone* v. *Chicago*, 195 Fed. 832; *Bicycle Stepladder Co.* v. *Gordon*, 57 Fed. 529; *United States* v. *Penelope*, 27 Fed. Cas. 486.

It necessarily appears that the petitioner was a resident and inhabitant, for the purposes of jurisdiction and venue,

of the Southern District of Mississippi and was not present within the territorial limits of the Northern District of Mississippi.

The following decisions from this Court construing Sections 112 and 113 hold that territorial jurisdiction may not be acquired by a District Court of the United States over a foreign corporation when sued in an action not local over its objection, unless such corporation is transacting business within the district. *Stonite Products Co.* v. *Melvin Lloyd Co.*, 315 U. S. 561, 567, 86 L. Ed. 1027; *Oklahoma Packing Co.* v. *Oklahoma Gas and Electric Co.*, 309 U. S. 4, 84 L. Ed. 537; *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 365, 84 L. Ed. 167; *Employers Reinsurance Corp.* v. *Bryant*, 299 U. S. 374, 81 L. Ed. 289; *Robertson* v. *Railroad Labor Board*, 268 U. S. 619, 69 L. Ed. 1119; *Bank of America* v. *Whitney Central National Bank*, 261 U. S. 171, 67 L. Ed. 594; *Peoples Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79, 62 L. Ed. 587; *St. L. & S. W. Ry. Co.* v. *Alexander*, 227 U. S. 218, 51 L. Ed. 486; *Green* v. *Chicago, Burlington & Quincy Ry. Co.*, 205 U. S. 530, 51 L. Ed. 916; *Ex parte Wisner*, 203 U. S. 449, 459, 51 L. Ed. 264, 267; *Harkness* v. *Hyde*, 98 U. S. 476, 25 L. Ed. 237; *Toland* v. *Spray*, 12 Pet. 300, 9 L. Ed. 1093; *Lafayette Ins. Co.* v. *French*, 18 How. 404, 15 L. Ed. 451; *St. Clair* v. *Cox*, 106 U. S. 350, 27 L. Ed. 222, 1 Sup. Ct. Rep. 354; *Goldey* v. *Morning News*, 156 U. S. 518, 39 L. Ed. 517, 15 Sup. Ct. Rep. 559; *Conley* v. *Mathieson Alkali Works*, 190 U. S. 406, 47 L. Ed. 1113, 23 Sup. Ct. Rep. 728; *Geer* v. *Mathieson Alkali Works*, 190 U. S. 428, 47 L. Ed. 1122, 23 Sup. Ct. Rep. 807; *Peterson* v. *Chicago, R. I. & P. R. Co.*, 205 U. S. 364, 51 L. Ed. 84, 27 Sup. Ct. Rep. 513; *Green* v. *Chicago B. & Q. R. Co.*, 205 U. S. 530, 51 L. Ed. 916, 27 Sup. Ct. Rep. 595; *Mechanical Appliance Co.* v. *Castleman*, 215 U. S. 437, 54 L. Ed. 272, 30 Sup. Ct. Rep. 125; *Herndon-Carter Co.* v.

James N. Norris Son & Co., 244 U. S. 496, 56 L. Ed. 857, 32 Sup. Ct. Rep. 550.

The decision of the Circuit Court of Appeals is in conflict with the following decisions of other Circuit Courts of Appeal on the same matter: *Sperry Products, Inc.* v. *Association of American Railroads* (C. C. A. 2), 132 Fed. (2d) 408; *Contracting Division A. C. Horn Corp.* v. *New York Life Insurance Co.* (C. C. A. 2), 113 Fed. (2d) 864; *London* v. *N. & W. Ry. Co.* (4 Cir.), 111 Fed. (2d) 127; see cases cited therein; *Oklahoma Packing Co.* v. *Oklahoma Gas and Electric Co.* (C. C. A. 10), 100 Fed. (2d) 770; *McCall Co.* v. *Bladsworth*, 290 Fed. 365; *Sewchulis* v. *Lehigh Valley Coal Co.* (C. C. A. 2), 233 Fed. 422.

Sections 112 and 113, above referred to, appeared in the Acts of Congress in 1887. They have been several times re-enacted without change in respect to the question now under discussion, including United States Code Annotated, from which it will necessarily appear that the construction given to the statutes by the Court became part of the re-enactment. *Federal Communications Commission* v. *Columbia Broadcasting System*, 311 U. S. 132, 85 L. Ed. 87; *Overstreet* v. *North Shore Corporation*, 318 U. S. 125, 87 L. Ed. 656; *Hecht* v. *Malley*, 265 U. S. 144, 68 L. Ed. 949; *U. S.* v. *Ryan*, 284 U. S. 167, 76 L. Ed. 224; *Johnson* v. *Manhattan Railway Co.*, 289 U. S. 479, 77 L. Ed. 1331; *Brewster* v. *Gage*, 380 U. S. 327, 74 L. Ed. 457.

This decision is directly in conflict with the case of *Stonite Products Co.* v. *Melvin Lloyd Co.*, 315 U. S. 561, 86 L. Ed. 1027, wherein it is pointed out that Section 113, being Section 52 of the Judicial Code, is an exception to Section 112. The Court used the following language:

> "The re-enactment of the Act of 1897 as Section 48, and of Rev. Stat. Section 740 as Section 52 of the Judicial Code by the Act of March 3, 1911, chap. 231, 36 Stat. at L. 1100, 1101, is not indicative of any Con-

gressional understanding that the two sections are complementary. Quite the contrary, for Section 52 appears in the Judicial Code as an exception to Section 51, the general venue provision derived from the Act of 1887, as amended. See Camp v. Gress, 250 U. S. 308, 315, 63 L. Ed. 997, 1002, 39 S. Ct. 478. Section 51 is, of course, not applicable to patent infringement proceedings. General Electric Co. v. Marvel Rare Metals Co., 287 U. S. 430, 77 L. Ed. 408, 53 S. Ct. 202, supra. Since Section 48 is wholly independent of Section 51, there is an element of incongruity in attempting to supplement Section 48 by resort to Section 52, an exception to the provisions of Section 51. Cf. Connecticul F. Ins. Co. v. Lake Transfer Corp. (C. C. A. 2d), 74 F. (2d) 258.

"Reversed."

The effect of the decision of the United States Circuit Court of Appeals in this case is to repeal Sections 112 and 113, U. S. C. A., Title 28, and to substitute Federal Rule 4(f) therefor.

The Circuit Court of Appeals cites no case sustaining its conclusions. The Court cites *McCormick Harvesting Machine Co.* v. *Walthers*, 134 U. S. 41, 33 L. Ed. 833. In that case a citizen of Nebraska sued the appellant, a foreign corporation, in the Nebraska District of the Federal Court of the State of Nebraska, where it was carrying on business. The plaintiff was a resident of the district, and the Court held that jurisdiction was had.

In the case of *Munter* v. *Weil Corset Co.*, 261 U. S. 276, a citizen of Connecticut sued a citizen of New York in the United States District Court of Connecticut, had the process sent to New York for service, and the Court held that there was absence of jurisdiction.

In the case of *Seaboard Rice Milling Co.* v. *Chicago, Rock Island & Pacific Railway Co.*, 270 U. S. 363, 70 L. Ed. 633, a citizen of Texas sued a railway corporation, a resident of Illinois, in the United States District Court of Mis-

souri. The Court held that the railway company could only be sued by a non-resident of the State of Missouri at the place of the defendant's domicile.

In the case of *Mass. Bonding and Ins. Co.* v. *Concrete Steel Bridge Co.* (C. C. A. 4), 37 Fed. (2d) 695, the appellant Bonding Company transacted business throughout the State of West Virginia. It was sued in the Northern District of West Virginia on a cause of action arising in such district. Process was served, however, on the State Auditor in the Southern District. The appellant, however, was present within the territorial jurisdiction of the district where the cause of action arose, and the fact that service of process was had on its agent for service of process was necessarily proper. The Court cites *Schwarz* v. *Artcraft Silk Hosiery Mills*, 110 F. (2d) 465. In that case a resident of New York sued two defendants, one a foreign corporation doing business within the territorial jurisdiction of the Court in the South District of New York; the other, an individual. The Court merely held that it could not be denied that under Rule 4(f) process could issue to another district in New York for the individual defendant, the Court having obtained jurisdiction over the corporate defendant which was present within the jurisdiction of the Court.

The Court overlooked the difference between jurisdiction and venue and service of process. Jurisdiction and venue are matters of substance.

Point III

The respondent was not a citizen or resident of the Northern District of Mississippi.

Respondent came to Jackson in 1924 and acquired a home in which he and his family have continuously resided, and during the entire time he has been engaged in one or

more business ventures. He still owned a very small country shack in the Northern District to which he occasionally returned and spent the night. He applied for homestead exemption from taxation under the Mississippi Law and made oath that he was a resident of Jackson in the Southern District of Mississippi (R. 25, 28, 34).

On the question of jurisdiction, this Court will examine the evidence for itself. *Sartor* v. *Arkansas Natural Gas Corp.*, decided March 27, 1944; *Crites, Inc.* v. *Prudential Insurance Co.*, decided May 22, 1944. The decision of the Circuit Court of Appeals is in conflict with the following applicable decisions from this Court: *District of Columbia* v. *Henry C. Murphy*, 314 U. S. 441, 86 L. Ed. 329; *Philadelphia Railroad Co.* v. *McKibben*, 243 U. S. 284, 61 L. Ed. 710; *Gilbert* v. *David*, 235 U. S. 561, 59 L. Ed. 360.

The decision of the Court of Appeals upon that point is in conflict with applicable local decisions. *Bank of Cruger* v. *Hodge*, 189 Miss. 356, 198 So. 26; *Ritter* v. *Whitesides*, 179 Miss. 706, 176 So. 728; *McHenry* v. *State*, 119 Miss. 289, 80 So. 763; *Hattiesburg* v. *Mollers*, 118 Miss. 154, 79 So. 87; *Hairston* v. *Hairston*, 27 Miss. 704.

We respectfully state:

1. The petitioner is an inhabitant and resident of the Southern District of Mississippi, where it maintains its principal and only place of business and where its resident agent for service of process resides, and the cause of action accrued.

2. Mississippi contains two Federal districts, and under Section 113, U. S. C. A., Title 28, suit may be brought against petitioner when sued alone in a civil action not local in the Southern District of Mississippi where it is an inhabitant and resident and the cause of action accrued.

3. Rule 4(f), Rules of Civil Procedure, for use in District Courts of the United States, does not abolish the pro-

vision for territorial jurisdiction over the petitioner provided in Section 113.

4. Rule 4(f), Rules of Civil Procedure, for use in the United States District Courts, could not be used to obtain personal jurisdiction in the United States District Court for the Northern District of Mississippi, over petitioner, a foreign corporation which never transacted business at any time within the district, but is an inhabitant and resident of the Southern District of Mississippi.

5. Rule 4(f), Rules of Civil Procedure, for use in the District Courts of the United States, may not enlarge or abridge the territorial jurisdiction or venue of actions provided in Section 112 and Section 113, U. S. C. A.

6. The mere fact that the committee having in charge the formulation of Rules of Civil Procedure, for use in the District Courts of the United States, expressed doubt as to whether Rule 4(f) would permit the issuance of process from one district to be served in another unless specially authorized by Congress, affords no basis for the conclusion reached in this case, since such rule was only intended to apply where territorial jurisdiction was present and venue properly laid.

7. The committee having in charge the promulgation of the Rules of Civil Procedure was confronted with the fact that in states having more than one district the agent for service of process for a foreign corporation usually being located at the seat of the State Government, might reside in a different district from the district wherein the foreign corporation maintained its principal office and place of business, and was an inhabitant and resident and under such circumstances the foreign corporation being within the territorial limits of the district where the suit was filed, it was appropriate that under Rule 4(f) process issue

to the district wherein the agent for service of process might be served.

8. Service of process and personal jurisdiction are separate and distinct and should not be confused. Personal jurisdiction may not be obtained over a foreign corporation in a civil action when sued alone, except and unless it is present within the territorial limits of the district where the suit is filed. If it is present, however, it is immaterial whether the agent for service of process may be found in the district or not.

9. In view of the expense, inconvenience, uncertainty and material departure from usual concepts of Federal jurisdiction and venue arising out of the Rule announced by the Circuit Court of Appeals in this case, so important a question should not be left to mere infants arising from the approval of the rules by this Court. Upon the other hand, it is appropriate that the Court take jurisdiction of this case and settle this important question which has never been decided by this Court.

10. The respondent, according to the undisputed facts, was a citizen and resident of the Southern District of Mississippi where he maintained his home and transacted his business. He did not have even a fleeting intention of taking up his residence in the Northern District of Mississippi.

Respectfully submitted,

E. C. Brewer,
Clarksdale, Mississippi;
William H. Watkins,
P. H. Eager, Jr.,
Mrs. Elizabeth Hulen,
Jackson, Mississippi,
Counsel for Petitioner.

Watkins & Eager,
Watkins & Avery,
Of Counsel.

APPENDIX "A"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE NORTHERN DISTRICT OF MISSISSIPPI

Civil Action No. 234

DENNIS MURPHREE, *Plaintiff,*

vs.

MISSISSIPPI PUBLISHERS CORPORATION, *Defendant*

Order

This day this cause came on to be heard on the motion to dismiss of Mississippi Publishers Corporation, Defendant, and the Court having heard and considered the same and being of the opinion that the same is well taken and should be sustained,

It is, therefore, Ordered and Adjudged, that the motion to dismiss of the defendant be and the same is hereby sustained, and plaintiff's complaint is hereby dismissed without prejudice at the cost of the plaintiff, for which let execution issue, and to all of which plaintiff excepts.

Ordered and Adjudged, this 5th day of December, 1944.

ALLEN COX,
District Judge.

APPENDIX "B"

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 11254

DENNIS MURPHREE, *Appellant*,

versus

MISSISSIPPI PUBLISHING CORPORATION, *Appellee*

Appeal from the District Court of the United States for the Northern District of Mississippi

(May 7, 1945)

Before Sibley, Hutcheson, and Lee, Circuit Judges

LEE, Circuit Judge:

Appellant, alleging himself to be a resident citizen of Calhoun County in the Northern District of Mississippi, brought this suit in the United States District Court for said district against the appellee, a Delaware corporation duly qualified to engage in business in Mississippi, to recover damages alleged to have resulted from a libel published editorially in a newspaper of the appellee in the city of Jackson in the Southern District of Mississippi. Process was served in the Southern District upon appellee's resident agent for process by the marshal for that district. Appellee moved to dismiss, alleging that the court had no jurisdiction over the subject matter or of the person of the defendant; that the venue was improperly laid; that the process was void under the law; and that the attempted service was insufficient.

The motion was tried on affidavits from which the court below found that appellant was a resident citizen of the Northern District of Mississippi; that the appellee was engaged in business in the Southern District of Mississippi, with its only office there, and, in obedience to the laws of Mississippi, had designated an agent for service of

process who resided in the city of Jackson; that the cause of action alleged arose there; and that process on appellee was served in the Southern District by virtue of Section (f) of Rule 4 of the Rules of Civil Procedure. Thereupon, the court below, interpreting the opinion in the Neirbo case to mean that for purposes of jurisdiction the Supreme Court will still recognize the legal fiction of citizenship of a corporation in the state of its incorporation, but for purposes of venue it would adopt the practical and realistic view that such a corporation is domiciled in any district where it does business and has in accordance with the mandate of the state law appointed an agent for the service of process, concluded; ". * * * it follows that under Section #113 of the Judicial Code, the defendant in this case, is in that limited sense, an inhabitant of the State of Mississippi, and entitled to be sued in the District of the State where it resides"; held "that there is not proper venue in the Northern District of Mississippi"; and dismissed the suit, without prejudice, for want of venue. This appeal followed. The sole question before us for determination is whether the District Court for the Northern District of Mississippi should have entertained the suit.

Since this is a civil suit between a citizen of Mississippi and a Delaware corporation and the amount in controversy exceeds $3,000, federal jurisdiction over the subject matter is present. Under Section 51 of the Judicial Code, 28 U. S. C. A., Sec. 112(a), where the jurisdiction is founded only on the fact that the action is between citizens of different states, venue may be laid "in the district of the residence of either the plaintiff or the defendant." When laid, as here, at the residence of the plaintiff, the process from that court directed to the marshal of ~~the Southern~~ District and served by him upon the resident agent for service of process of the appellee in that district, conferred upon the court jurisdiction of the person of the appellee. Rule 4(f), Federal Rules of Civil Procedure. The Neirbo case indicates nothing to the contrary. In fact the Supreme Court in that case seemed to recognize that the question before it would not have been raised had the suit been brought in the district of the residence of the plaintiff

or that of the defendant. In the very beginning of the opinion, Mr. Justice Frankfurter said:

> "The suit was based on diversity of citizenship and was not brought 'in the district of the residence of either the plaintiff or the defendant.' "

And no language in the opinion which follows disturbed or modified the lower court's holding that "had plaintiffs been residents of the Southern District of New York, so that venue was properly laid, service of process upon the defendant would have been had by service upon its agent". The rationale of the opinion in the Neirbo case is that a foreign corporation, by the appointment of an agent for the service of process in accordance with the laws of the state in which the corporation is doing business, waives the provisions of the venue statute which otherwise it would be entitled to assert; by such act it affirmatively consents to be sued in the courts in that state, state and federal. Prior to the Neirbo case the courts generally had held that such an appointment did not constitute a waiver by a corporation of its right to be sued in the district of which it was an inhabitant; but even when so holding, the courts recognized the right of a plaintiff in diversity of citizenship cases to subject a corporate defendant to suit in a federal court of the district of which the plaintiff was a resident.

Section 113, Title 28 U. S. C. A., relied on by the Court below does not conflict with but supplements Section 112(a). Under Sections 112(a) and 113, where diversity of citizenship exists and suit is not brought in the district of the residence of the plaintiff but in the district of the residence of the defendant, and the defendant resides in a state containing more than one district, and the suit is not one of a local nature, then venue must be laid in that district of the state where the defendant resides.

More troublesome, perhaps, is the question whether the court of the Northern District could obtain jurisdiction over the person of the defendant by service of process outside the district. This question relates to the power of the Supreme Court to promulgate Rule 4(f) of the Federal Rules of Civil Procedure. While the rule affects neither venue nor jurisdiction over the subject matter,

it does permit the court to acquire personal jurisdiction over a defendant in another district within the state in a case like the present—a power that did not exist prior to the adoption of the rules. As was pointed out in Moore's Federal Practice, Vol. 1, page 361, "Since the Advisory Committee specifically called the attention of the Supreme Court to the question of its power to promulgate this rule, it may be safely assumed that the Supreme Court, by promulgating the rule, has concluded that it has the power."

In this court appellee contends that the consent to be sued flowing from the appointment of an agent for service of process under state law is limited by the state venue statutes and this limitation governs the venue of the federal courts in the state; and appellee argues that as the Mississippi statute in fixing venue of suits in the state courts fixes venue either in the district where the cause of action accrued or where the defendant had its principal place of business, venue in this case was improperly laid in the District Court for the Northern District of Mississippi, since the cause of action accrued in the Southern District of Mississippi and appellee had his principal place of business in that district. What the situation might be if there were no federal statute fixing venue is not before us. It is hornbook law that where a federal statute fixes the venue of the federal courts, state laws are inapplicable. Cf. Munter v. Weil Corset Co., 261 U. S. 276, 278.

Considerable space is devoted in the briefs to a consideration of the issue of fact with respect to the place of residence of the plaintiff. The finding of the court below on this issue is supported by substantial evidence—evidence which has convinced us that the lower court's finding on this issue is correct.

The judgment appealed from is reversed, and the cause is remanded for proceedings in accordance with the views herein expressed.

Reversed and Remanded.

A True copy. Teste:

——— ———,

Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

APPENDIX "C"

Section 5319, Mississippi 1942 Code, contains the following language:

"Every foreign corporation doing business in the state of Mississippi, whether it has been domesticated or simply authorized to do business within the state of Mississippi, shall file a written power of attorney designating the secretary of state or in lieu thereof an agent as above provided in this section, upon whom service of process may be had in the event of any suit against said corporation; and any foreign corporation doing business in the state of Mississippi shall file such written power of attorney before it shall be domesticated or authorized to do business in this state, and the secretary of state shall be allowed such fees therefor as is (sic) herein provided for designating resident agents. Any foreign corporation failing to comply with the above provisions shall not be permitted to bring or maintain any action or suit in any of the courts of this state."

APPENDIX "D"

Section 1433, Mississippi 1942 Code.

"Venue of actions, what county generally—actions against public officer to be brought in county of his residence.—Civil actions of which the circuit court has original jurisdiction shall be commenced in the county in which the defendants or any of them may be found, and if the defendant is a domestic corporation, in the county in which said corporation is domiciled, or in the county where the cause of action may occur or accrue except where otherwise provided, and except actions of trespass on land, ejectment, and actions for the statutory penalty for cutting and boxing trees and firing woods and actions for the actual value of trees cut which shall be brought in the county where

the land or some part thereof, is situated; but if the land be in two or more counties, and the defendant resides in either of them, the action shall be brought in the county of his residence, and in such cases, process may be issued against the defendant to any other county. If a citizen resident in this state shall be sued in any action, not local, out of the county of his household and residence, or if a public officer be sued in any such action, out of the county of his household and residence, although a surety or sureties, or some of the sureties, on his bond, or other joint defendant, sued with him, be found or be subject to action in such county, the venue shall be changed, on his application, before the jury is impaneled, to the county of his household and residence, whether such suit is filed before or after such officer's term of office has expired."

APPENDIX "E"

Quotation from Harvard Law Review, Volume 53, Page 660.

"But, in view of the cases insisting on the transaction of business as a prerequisite to jurisdiction, (note 38) and the distinct character of the federal judicial districts, (note 39) as well as the fact that domestic corporations, whose incidents it seems the ideal of the Neirbo case to impose on foreign corporations, have a residence for venue purposes only in the district where their principal place of business is located, (note 40) it is quite likely that the suability of a foreign corporation may be restricted. Should a rule be evolved confining the venue of a foreign corporation to the district of its principal place of business, there need be no fear that the beneficial effects of the Neirbo rule will be circumvented by appointment of an agent in another district within the state to satisfy state requirements, since Rule 4(f) of the new Federal Rules of Procedure now provides that

the process of a district court may run into other districts in the same state even in transitory actions. (note 41) And the plaintiff would not be hindered in his enjoyment of his new rights by any inconvenience in serving an agent hundreds of miles away since service of process is by an officer of the court who can be conveniently chosen for the occasion. (note 42)

"Although the decision will undoubtedly result in increasing the business of the federal courts, it is not in conflict with the policy against extending federal jurisdiction; (note 43) rather its effect is to redistribute to more appropriate and convenient forums cases already within the purview of some district court."

The following additional language is used:

"A new problem is raised; in states encompassing more than one Federal Judicial District, it will be necessary to define the extent of the consent to suit. The implication of actual acquiescence to suit in the state would seem to make a foreign corporation subject to action in any district although neither its business nor its agent is there located. In New York, at least, is denied to the foreign corporation the protection of its own venue statute. But, in view of the cases consisting of the transaction of business as a prerequisite to jurisdiction, and the distinct character of Federal Judicial District as well as the fact that domestic corporations, is incident it seems that the ordeal of the Neirbo case to impose on foreign corporations, have a residence for venue purposes only in the district where their principal place of business is located, it is quite likely that the suability of a foreign corporation may be restricted. Should a rule be evolved confining the venue of a foreign corporation to the district of its principal place of business, there need be no fear that the beneficial effects of the Neirbo rule will be circumvented by appointment of an agent in another district within the state to satisfy state requirements, since Rule 4(f) of the new Federal Rules of Civil procedure

now provides that the process of the district courts may run into other districts in the same state even in transitory actions. And the plaintiff would not be hindered in his enjoyment of his new rights by any inconvenience in serving an agent hundreds of miles away since service of process is by an officer of the court who can be conveniently chosen for the occasion."